

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENDA L. NAFF)	
Claimant)	
VS.)	
)	
DAVOL, INC.)	Docket No. 204,405
Respondent)	
AND)	
)	
LUMBERMENS MUTUAL CASUALTY CO.)	
Insurance Carrier)	

ORDER

The above matter comes on before the Workers Compensation Board on remand from the Kansas Court of Appeals. This matter originally came before the Workers Compensation Board for review of an Order entered by Administrative Law Judge Floyd V. Palmer on March 6, 1997. In that Order, the Administrative Law Judge granted claimant medical treatment with Dr. Lynn Ketchum and his referrals, and specifically included, in the treatment, surgery to claimant's right arm. An appeal by respondent was brought to the Board which held in its May 29, 1997, Order that it did not have jurisdiction to consider the issue of whether claimant is in need of additional medical treatment on appeal from a preliminary hearing. The Court of Appeals reversed, finding that the Order for medical treatment was not a preliminary order. The Kansas Court of Appeals then remanded this matter to the Board for a review of the Administrative Law Judge's decision on the merits.

APPEARANCES

Claimant appeared by her attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Mark E. Kolich of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as set forth in the original November 27, 1996, Award of Special Administrative Law Judge William F. Morrissey have been considered by the Appeals Board. In addition, the transcript of preliminary hearing dated February 21, 1997, with the attached exhibits, was also considered by the Appeals Board for the purposes of this decision.

ISSUES

Did the Administrative Law Judge exceed his jurisdiction in authorizing Dr. Lynn Ketchum as the treating physician and granting claimant medical treatment, including surgery, rather than allowing respondent under K.S.A. 1998 Supp. 44-510(c) to designate a list of three physicians from which claimant could choose a treating physician?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter originally went to award on November 27, 1996, at which time Special Administrative Law Judge William F. Morrissey awarded claimant a 10 percent impairment to the right upper extremity and a 15 percent impairment to the left upper extremity. In the Award, the Special Administrative Law Judge granted claimant "[c]ontinuing conservative medical care, as needed" The Award went on to require claimant to file an application with the Director for approval of more extensive medical care.

In January 1997, claimant applied to the Division of Workers Compensation, requesting that Dr. Lynn Ketchum, an Overland Park orthopedic surgeon, be authorized to provide treatment, including surgery to claimant's right upper extremity. Claimant had been receiving conservative treatment through Dr. Chris D. Fevurly, with that treatment being authorized. Dr. Fevurly did not recommend surgery. Claimant had been examined and/or treated by several other physicians of various specialties, with only Dr. Ketchum recommending the surgery to claimant's right upper extremity. K.S.A. 1998 Supp. 44-510(c)(1) states in part:

If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers that are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this

subsection (c)(1), either party or both parties may request the director to select a treating health care provider.

It is noted that Dr. Fevurly continued to offer treatment to claimant as indicated in his December 16, 1996, report. In order for K.S.A. 1998 Supp. 44-510(c)(1) to apply, the services of the health care provider furnished must be unsatisfactory. While there was no finding by Administrative Law Judge Palmer that Dr. Fevurly's medical treatment was unsatisfactory, the fact that the medical treatment requested by claimant was granted is an indication that the Administrative Law Judge determined the treatment provided to that point was unsatisfactory. The Appeals Board also notes that while treatment was ongoing, it was of a conservative nature. This conservative care had been provided to claimant for a substantial period of time and had given claimant no relief. In addition, another course of treatment had been recommended by another doctor, i.e., Dr. Ketchum, and claimant desired to pursue this new course of treatment. This would indicate to the Board that the course of treatment being provided was unsatisfactory not only to claimant but also to a qualified health care professional. Therefore, the Appeals Board finds that the requirement under K.S.A. 1998 Supp. 44-510(c), that the treatment provided be unsatisfactory, has been met.

The statute goes on to obligate the employer to submit the names of three health care providers not associated in practice together. Claimant then chooses from the list of three, and that person shall become the authorized treating health care provider. This provision of the statute was not followed by the Administrative Law Judge. The Administrative Law Judge instead appointed Dr. Ketchum as the authorized treating physician. The Appeals Board finds, in following K.S.A. 1998 Supp. 44-510(c), that respondent shall submit the names of three health care providers that are not associated in practice together and claimant may then select from the list with that provider being designated as the authorized treating health care provider.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Floyd V. Palmer dated March 6, 1997, should be, and is hereby, modified, and medical treatment is granted and ordered paid on claimant's behalf by respondent and its insurance carrier, with the respondent to provide to claimant a list of three health care providers not associated with each other from which claimant may then choose the authorized health care provider.

IT IS SO ORDERED.

Dated this ____ day of August 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Mark E. Kolich, Kansas City, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director